

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-5538

ZAKHAR MELKONYAN, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-10) is reported at 895 F.2d 556.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1990, and a petition for rehearing was denied on May 29, 1990. Pet. App. 11. The petition for a writ of certiorari was filed on August 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 28, 1982, petitioner filed an application for disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42

U.S.C. 1381 et seq. An administrative law judge determined after a hearing that petitioner was not disabled within the meaning of the Act, and the Appeals Council denied review. On June 8, 1984, petitioner filed a complaint in district court seeking judicial review of the Secretary's final decision pursuant to 42 U.S.C. 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. 405(g). Pet. App. 1, 6-7.

On May 30, 1984, shortly before filing his civil action, petitioner filed a second application for benefits, supported by new evidence of disability. Upon review of this second application, petitioner was found to be disabled as of May 30, 1984. On October 18, 1984, petitioner filed a motion for summary judgment in his action for judicial review of the Secretary's decision denying his first application. That motion was accompanied by the new evidence of disability adduced in the proceedings on his second application. Pet. App. 7.

While the summary judgment motion was pending, the Appeals Council, after reviewing the developments in connection with petitioner's second application, decided that it would accept a voluntary remand of the case for further administrative proceedings.¹ The Secretary offered to stipulate to such a remand, but petitioner's counsel refused to do so. Accordingly,

¹ Disability benefits may not be paid under the SSI program for any period preceding the date on which an application is filed. 20 C.F.R. 416.501. Thus, in granting petitioner's second application, the Secretary could not award benefits retroactively to the date of petitioner's first application without further consideration of the first application.

on December 18, 1984, the Secretary filed a motion requesting that the court, "in its discretion and pursuant to [petitioner's] prayer for relief in his complaint, order this case be remanded" to the Secretary "for further proceedings." App. A, infra. Although petitioner at first opposed a remand, App. B, infra, he subsequently filed his own motion "for an order remanding this case to the [Secretary]." App. C, infra. In response, the district court entered its "judgment" in the case on April 5, 1985, which stated (App. D, infra):

Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

Following the remand, the Appeals Council, on May 7, 1985, vacated the ALJ's decision denying petitioner's first application and determined that petitioner had been disabled since the date on which that application was filed (May 28, 1982). App. E, infra; see generally Pet. App. 1-2, 3, 7.

2. More than a year later, on May 19, 1986, petitioner filed an application in the district court for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. 7. The magistrate recommended that the fee application be denied, id. at 1-4, concluding that the Secretary's denial of petitioner's first application was "substantially justified" within the meaning of EAJA, 28 U.S.C. 2412(d)(1)(A), because the medical reports in the original record did not indicate that he was disabled. Id. at 3-4. On February 18, 1987, the district court, following the magistrate's recommendation, denied

petitioner's application for attorney's fees. Id. at 5.

3. The court of appeals vacated the district court's judgment denying petitioner's application for attorney's fees on the merits and remanded the case with instructions to dismiss for lack of jurisdiction. Pet. App. 5-10. The court pointed out that under 28 U.S.C. 2412(d)(1)(B), an application for EAJA fees must be filed within 30 days of the "final judgment in the action," a term that is defined as "a judgment that is final and not appealable." Pet. App. 8 (quoting 28 U.S.C. 2412(d)(1)(B) and (d)(2)(G)). Applying that definition, the court held that the Secretary's May 7, 1985, decision following the remand constituted a "final judgment" for purposes of commencing the 30-day filing requirement under EAJA, and that petitioner's application filed on May 19, 1986, therefore was untimely. Pet. App. 8.

In so holding, the court of appeals first concluded that the district court's April 5, 1985, judgment remanding the case to the Secretary could not itself be the "final judgment" for purposes of EAJA, because both parties anticipated further proceedings after the remand. Pet. App. 7-8. The court further noted that there was no other order of the district court that could serve as the "final judgment" for these purposes, since the court did not enter a new judgment (or any other order) after the Appeals Council rendered its decision on remand. Id. at 8.

In these circumstances, the court held that the Secretary's final decision on remand (the Appeals Council's May

7, 1985, decision) must be regarded as the "final judgment" for purposes of commencing the 30-day period for filing a fee application under EAJA. In the court's view, that decision satisfied the statutory requirement of being "final and not appealable" by either party. 28 U.S.C. 2412(d)(2)(G). The court explained that because 42 U.S.C. 405(g) authorizes judicial review only by an "individual" who is aggrieved by the Secretary's final decision after a hearing, "the Secretary would not have standing or reason to complain of his own final decision." Pet. App. 8. "Likewise," the court continued, "if a claimant wholly prevails on his claim, he would have no reason to appeal that decision." Ibid. Because petitioner did not seek EAJA fees until more than a year after the Secretary rendered this "final judgment," the court held that the district court lacked jurisdiction to entertain his application. Id. at 8-9.

The court distinguished Guthrie v. Schweiker, 718 F.2d 104 (4th Cir. 1983), which relied on the language in the sixth sentence of 42 U.S.C. 405(g) that provides for the Secretary to file with the district court his revised findings of fact and decision after a remand covered by that sentence. The Fourth Circuit reasoned in Guthrie that after such a filing, the district court should enter a final judgment, which would commence the running of the 30-day filing period under EAJA. See Pet. App. 9 (citing 718 F.2d at 106).

The court below found the Guthrie approach "troublesome," because 42 U.S.C. 405(g) does not confer upon the district court

any independent power to review the post-remand filing by the Secretary, and because the merits of the Secretary's new decision on remand therefore may be reviewed by the district court only if the claimant seeks judicial review of that decision within 60 days, in the usual manner provided by 42 U.S.C. 405(g). Pet. App. 9. Furthermore, the court below could not "see any advantage to such an approach," because "[i]f the Secretary's decision is wholly in favor of the claimant," there would seem to be no "need for overburdened district courts to deploy scarce judicial resources in a sua sponte 'affirmation' of uncontested eligibility decisions." Ibid. In addition, the court noted that Guthrie was decided before Congress enacted EAJA's definition of the term "final judgment" in 1985. The Fourth Circuit had assumed that that term referred only to an order of the sort a court may enter, as under Fed. R. Civ. P. 54, but the court did not believe that the new version required that the meaning of the term "judgment" be so confined. It therefore held that a "final judgment" for these purposes may also include the final administrative decision of the agency following a remand. Pet. App. 9.

The court of appeals noted that its approach "not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards under section 2412 in similar circumstances." Pet. App. 9-10. The court explained that "[r]ather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district

court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a 'final judgment' under section 2412(d)(2)(G)." Pet. App. 10.

ARGUMENT

The court of appeals properly held that, in the context of a remand of a Social Security case to the Secretary for further administrative proceedings, a final decision of the Secretary after the remand that awards benefits to the claimant is a "final judgment" that commences the 30-day period for filing an application for attorney's fees under EAJA. That holding comports with the text and purposes of EAJA and with the analytical framework of this Court's decisions in Sullivan v. Hudson, 109 S. Ct. 2248 (1989), and Sullivan v. Finkelstein, 110 S. Ct. 2658 (1990), which considered the nature of remands under 42 U.S.C. 405(g). As petitioners point out, the decisions of several other courts of appeals previously had suggested a different approach. But the essential premises of those decisions have been shown by Hudson and Finkelstein to be mistaken. There is no post-Finkelstein circuit conflict on the question whether the Secretary's final and non-appealable decision on remand may be regarded as a "final judgment" for purposes of EAJA. The petition for a writ of certiorari therefore should be denied.

1. As relevant here, EAJA provides that "a court shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in any civil action * * * , including

proceedings for judicial review of agency action, brought against the United States * * * , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C.

2412(d)(1)(A). Section 2412(d)(1)(B) provides that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and expenses * * * ." The court of appeals correctly held that the Appeals Council's decision after remand, which found petitioner disabled and awarded him all the relief he sought, triggered the 30-day period for filing an application for attorney's fees under EAJA.

First, this interpretation is entirely consistent with the text of EAJA. Section 2412(d)(2)(G), which was added to EAJA as part of the 1985 revision, defines the term "final judgment" as "a judgment that is not appealable, and includes an order of settlement." Nothing in this definition limits a "judgment" for purposes of EAJA to orders entered by a court. Moreover, the ordinary meaning of the term "judgment" is "a formal decision or determination given in a cause by a court of law or other tribunal," Webster's Third New International Dictionary, at 1223 (1986) (emphasis added), a meaning that encompasses a decision by the Appeals Council that terminates all proceedings on an application for benefits.

To be sure, "judgment" also is used as a term of art having special application to judicial proceedings. But in that

setting, a "judgment" typically refers to an order of a court that is appealable. See Fed. R. Civ. Proc. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); Finkelstein, 110 S. Ct. at 2665 ("appealable" is "a meaning with which 'final' is usually coupled"). The EAJA definition fundamentally departs from that usage by requiring that the order be "final and not appealable." 28 U.S.C. 2412(b)(2)(G). This significant departure from the usual characteristics of a "judgment" entered by a court reinforces the conclusion that Section 2412(b)(1)(B) should not be read implicitly to limit the "final judgment[s]" that trigger the 30-day filing period to orders that have been entered by courts. Cf. Bell v. United States, 462 U.S. 356, 360-361 (1983).

Second, in Hudson, the Court held that in a Social Security case brought under 42 U.S.C. 405(g), the "civil action" for which attorney's fees may be awarded under 28 U.S.C. 2412(b)(1)(A) may include the proceedings before the Secretary following a remand from the district court. The Court relied on its past decisions under other fee-shifting statutes indicating that "where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." 109 S. Ct. at 2255; see also id. at 2257 ("administrative proceedings may * * * be considered part of the 'civil action' for purposes of a fee award"). Accord,

Commissioner of INS v. Jean, 110 S. Ct. 2316, 2320-2321 (1990) (citing Hudson) (EAJA "favors treating a case as an integrated whole, rather than as atomized line-items").

As noted above, the operative language here requires a party to file his EAJA application "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). Since, as held in Hudson, the concept of the "civil action" in this setting may extend to the administrative proceedings following a remand by the district court, the "final judgment" in such a civil action similarly may extend to the decision of the Secretary that terminates those administrative proceedings on remand.

Specifically, as the court of appeals held (Pet. App. 8), where the Secretary's decision following the remand finds the claimant disabled and awards him all the benefits he seeks, that decision is "final and not appealable" by either the claimant or the Secretary. See 28 U.S.C. 2412(d)(2)(G). Such a decision of the Secretary therefore terminates not only the administrative proceedings themselves, but also the overall "civil action," of which those proceedings on remand are the last stage. The decision of the Secretary therefore is the "final judgment in the [civil] action," which commences the running of the 30-day period for filing an EAJA fee application under 28 U.S.C. 2412(d)(1)(B).

Finally, the holding below is consistent with Congress's purpose to fix a definite time limitation on the filing of fee applications. A decision on remand that is favorable to the claimant effectively ends the underlying litigation and

immediately enables the reviewing court to determine whether the claimant is a prevailing party for purposes of EAJA. As such, the administrative decision on remand is "final" in every respect relevant to the determination of a claimant's entitlement to fees. Hudson, 109 S. Ct. at 2255. A construction that would nonetheless make resolution of the attorney's fee issue contingent upon completion of additional (yet pointless) procedural steps in the district court would invite needless and potentially indefinite delay in the resolution of fee questions -- a result that is plainly at odds with the 30-day time limit on fee applications that Congress prescribed.²

2. Petitioner contends (Pet. 6-7, 8), however, that there can be no "final judgment" terminating the civil action until the district court takes some further action subsequent to the Secretary's final decision on remand. This contention is inconsistent with Finkelstein. There, the Court held that in an action for judicial review pursuant to 42 U.S.C. 405(g), a district court order reversing the Secretary's decision denying benefits and remanding the case to the Secretary for a rehearing is a "final judgment" that is subject to immediate appeal by the Secretary under 28 U.S.C. 1291. The Court found in the structure of 42 U.S.C. 405(g) an indication that each final decision of the

² In this case, for example, petitioner requested EAJA fees more than one year after the Secretary determined on remand that he was disabled. Under petitioner's view, however, his fee request would be deemed timely (indeed premature) because the district court had not entered an order "affirming" the Secretary's uncontested determination that petitioner was eligible for benefits.

Secretary (i.e., the first such decision and the decision rendered after the remand) "will be reviewable in a separate piece of litigation." 110 S. Ct. at 2663. Accordingly, the district court's remand order "terminated the civil action" challenging the Secretary's first decision denying benefits. Id. at 2664. Thus, there is nothing in the nature of a civil action for judicial review under 42 U.S.C. 405(g), or of a remand order entered at the conclusion of such an action, that requires the district court to do anything further after the remand to the Secretary.

Hudson held that "for purposes of the EAJA," the administrative proceedings following the remand may be considered "part and parcel of the [civil] action for which fees may be awarded." 109 S. Ct. at 2255. See Finkelstein, 110 S. Ct. at 2666. But nothing in this holding regarding the services for which fees may be awarded requires the district court to take any further action, following the remand, to terminate the civil action on the merits. To the contrary, the Court made clear in Finkelstein that despite its prior holding in Hudson, the civil action was terminated, insofar as any substantive role of the district court was concerned, when it remanded the case to the Secretary. 110 S. Ct. at 2666-2667. Thus, Hudson and Finkelstein together contemplate that a "civil action" under 42 U.S.C. 405(g) extends (for purposes of EAJA) to the ancillary administrative proceedings on remand, but that the civil action, as so extended, terminates (for purposes of EAJA) if the

Secretary renders a decision on remand that is fully favorable to the claimant and is, for that reason, final and not appealable by either party. Contrary to petitioner's contention (Pet. 7-11), then, the decision below is fully consistent with both Hudson and Finkelstein.

3. In arguing that some further action by the district court is required in order for there to be a "final judgment" for purposes of EAJA, petitioner relies (Pet. 5) on the language in the sixth sentence of 42 U.S.C. 405(g) stating that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based." The seventh sentence then provides that "[s]uch additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision." In petitioner's view, these provisions confirm that the Secretary must file his decision on remand with the district court and that the district court must then enter a judgment on the basis of that filing.

Petitioner's argument ignores the fact that, as Finkelstein held, the sixth and seventh sentences of Section 405(g) do not apply to all remands by the district court in cases under Section 405(g); they instead are concerned with a special

and limited sort of remand, for the receipt and weighing of new evidence, during which the case remains within the jurisdiction of the district court. See 110 S. Ct. at 2664-2665. Those provisions are inapplicable to all other remands in civil actions under Section 405(g). For the same reason, petitioner errs in relying (Pet. 7-8) on the passing reference in Hudson (109 S. Ct. at 2255) to the description of the sixth sentence of Section 405(g) in Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983). This Court subsequently recognized in Finkelstein that the sixth and seventh sentences have a far narrower scope, and it declined to follow the broader implications of the language in Hudson. See 110 S. Ct. at 2666-2667.

4. Perhaps appreciating this defect in his broad reliance on the sixth sentence of Section 405(g) and Hudson in the wake of Finkelstein, petitioner asserts (Pet. 10-11) that the district court's remand order in this case was entered pursuant to the sixth sentence of Section 405(g) and that the Secretary therefore was required to file his remand decision in this case with the district court, which would then have entered a final judgment on the basis of such a filing. For this reason, petitioner maintains, the decision below is inconsistent with Finkelstein's discussion of the sixth sentence of Section 405(g). This argument is without merit. Nothing in the district court's order in this case suggests that the remand was pursuant to the sixth sentence of Section 405(g): there is no indication that the remand was to be of only limited scope and that the district

court was retaining jurisdiction with the intention of entering its final judgment on the merits at a later date, after the Secretary filed his modified findings and decision with the court. To the contrary, the court expressly styled its order a "judgment" and stated that "the matter is remanded to the Secretary for all further proceedings." App. D, infra (emphasis added). The district court thus clearly contemplated that it was terminating all judicial proceedings on the merits of petitioner's claim for benefits and returning the matter to the jurisdiction of the Secretary, just as was done in Finkelstein.³

5. Petitioner also contends (Pet. 5-6) that review is warranted because the decision below conflicts with Guthrie v. Schweiker, 718 F.2d at 106; Brown v. Secretary of HHS, 747 F.2d 878, 884-885 (3d Cir. 1984); and Taylor v. Heckler, 778 F.2d 674, 677 (11th Cir. 1985). In light of intervening developments, however, those decisions do not justify review in this case.

The Fourth Circuit in Guthrie relied on three premises in holding that the Secretary should file his new decision on remand

³ There would be much to commend the Ninth Circuit's approach even in a case remanded to the Secretary pursuant to the sixth sentence of Section 405(g). Where the Secretary renders a fully favorable decision after such a remand, there is little point in filing the decision and transcript of proceedings with the district court or in requiring further action by the district court as a precondition to the filing of a fee application. Following the Ninth Circuit's approach in that setting also would have the virtue of uniformity, thereby eliminating the need to distinguish between different kinds of remands in construing sometimes ambiguous district court orders. This case, however, presents no occasion for addressing whether the 30-day period for filing an EAJA application might, in appropriate circumstances, commence with the rendering of a fully favorable decision on remand under the sixth sentence of Section 405(g).

with the district court and the district court should then enter a judgment on the basis of that decision, which would trigger the 30-day period for filing a fee application under EAJA. Each of those premises has since been shown to be erroneous. First, the Fourth Circuit believed, contrary to the subsequent decision in Finkelstein, that a district court's remand order is not a final decision that terminates proceedings in the court and is subject to immediate appeal. 718 F.2d at 106. Second, in concluding that the Appeals Council's decision on remand cannot be a "final judgment" that commences the 30-day period for filing an EAJA application, the Fourth Circuit relied on its view that "EAJA draws a clear distinction between final administrative actions and final judicial actions." Ibid. (comparing 5 U.S.C. 504(a)(2) with 28 U.S.C. 2412(d)(1)(B)). This rationale is inconsistent with the subsequent decision in Hudson, where the Court rejected the government's similar argument (likewise based on a comparison between 5 U.S.C. 504 and 28 U.S.C. 2412) that the administrative proceedings on remand are wholly distinct from the "civil action" for purposes of EAJA. 109 S. Ct. at 2257-2258. Third, as noted above, Guthrie relied on the language in the sixth sentence of Section 405(g) requiring the Secretary to file his new decision on remand with the district court (718 F.2d at 106); Finkelstein held, contrary to the Fourth Circuit's apparent belief, that this provision does not apply to all remands. 110 S. Ct. at 2664. '

⁴ Moreover, as the Court observed in Finkelstein, "it is far from clear that Guthrie did not involve a sixth-sentence remand." 110 S. Ct. at 2666 n.8.

In Brown, the Third Circuit, following Guthrie and likewise relying on the sixth sentence of Section 405(g), stated in dictum that the Secretary must file his new decision on remand with the district court and the district court may then affirm, modify or reverse that decision, which would constitute the requisite "final judgment" triggering the 30-day EAJA filing period. 747 F.2d at 884-885. Like Guthrie, this analysis in Brown does not survive Finkelstein. In Taylor, the Eleventh Circuit reasoned that a district court order remanding a case to the Secretary is not a final judgment subject to immediate appeal; that because the remand order therefore is interlocutory, the district court retains jurisdiction during administrative proceedings on remand; that the district court therefore must enter an order at a later date to terminate its jurisdiction; and that an order entered after the administrative proceedings have been completed on remand therefore must be the one that terminates the court's jurisdiction and therefore is the "final judgment" that commences the 30-day period for filing an EAJA application. 778 F.2d at 677-678 & n.2. The basis for the Eleventh Circuit's belief that the district court must enter a post-remand order (which in turn must be the "final judgment" for EAJA purposes) -- namely, that a remand order is not appealable -- of course was erroneous under Finkelstein.

In short, all of the decisions upon which petitioner relies for his assertion of a circuit conflict rest on premises that have since been shown by Hudson and Finkelstein to have been

erroneous. Because the asserted circuit conflict has been superseded, it does not warrant review. There is, moreover, no conflict between the decision below and a post-Finkelstein decision of another court of appeals. The only other court to consider the question since Finkelstein has also concluded, relying on the Ninth Circuit's decision in this case, that a fully favorable decision by the Secretary after a remand is a "final judgment" that triggers the 30-day period for filing a fee application under EAJA. Gordon v. Secretary of HHS, No. 90-1206 (6th Cir. Oct. 15, 1990).⁵

⁵ In Myers v. Sullivan, No. 89-3533 (11th Cir. Nov. 6, 1990), which was a consolidated opinion rendered in four individual cases, the Secretary's decision on remand in fact was filed with the district court (either by the Secretary or the claimant), and the district court then entered an order disposing of the case. The court held that, even though the district court in each case sustained the Secretary's decision on remand (and even though the Secretary therefore would be unlikely to appeal such an order), the orders did not become "final judgments" that commenced the 30-day period for filing an EAJA application until there was some affirmative indication that the Secretary would not appeal. In the court's view, that ordinarily would be only after the 60-day period for filing a notice of appeal under Fed. R. Civ. P. 4 had expired, unless there was some earlier, definitive statement by the Secretary disavowing appeal. Slip op. 458-459.

Because the administrative decisions on remand in Myers had been filed with the district court and the district court then entered an order disposing of each case, the Eleventh Circuit had no occasion to consider whether the Secretary's fully favorable decision on remand would have qualified as a "final judgment." The Eleventh Circuit did, however, describe the practice under Guthrie, Brown and its own decision in Taylor as reflecting rules that, "[u]ntil recently," had governed Social Security cases. Slip op. 459-460. Especially in light of the view expressed elsewhere in the opinion that Finkelstein had worked a substantial change in governing principles (slip op. 465-466), the implication of the Eleventh Circuit's observation is that those rules no longer obtain. The court also stressed that the term "final judgment" is to be interpreted flexibly and pragmatically.

For similar reasons, petitioner's reliance (Pet. 6-7) on the reference to Guthrie in the House Report on the 1985 amendments to EAJA is misplaced. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 19-20 (1985). That reference was in a part of the Report that discussed a provision of the 1985 amendments addressing the interaction of EAJA and the special provision in the Social Security Act, 42 U.S.C. 406(b), for payment of attorney's fees out of the claimant's past-due benefits. As part of the background for that discussion, the Report described how some courts had resolved EAJA issues in the Social Security context. Thus, the Report noted that a claimant ordinarily had not been regarded as a "prevailing party" solely by virtue of obtaining a remand to the Secretary. Id. at 19. It then stated that Guthrie had "pointed to the provision of 42 U.S.C. 405(g) providing that after the HHS review upon remand the agency must file its findings with the reviewing court." Ibid. The Report continued: "Thus the remand decision is not a 'final judgment,' nor is the agency decision after remand"; "[i]nstead, the District Court should enter an order affirming, modifying or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running." Ibid.

As the Court noted in Finkelstein (110 S. Ct. at 2665-2666 n. 8), this 1985 Report on EAJA sheds no light on the interpretation of Section 405(g) as originally enacted in 1939, and its discussion of the procedures required by Section 405(g) and Guthrie was mistaken. The Report therefore sheds little

light on whether, once those essential but mistaken premises are put to one side, the Secretary's decision on remand may properly be regarded as the "final judgment" for purposes of commencing the 30-day period for seeking EAJA fees -- especially in light of the subsequent decisions in Hudson, holding that the proceedings on remand are part of the civil action for purposes of EAJA, and in Finkelstein, holding that a remand order terminates the proceedings in the district court.

In light of Finkelstein, neither the Secretary nor the district court is required to take any further action following many decisions on remand if those decisions are fully favorable to the claimant. If the Secretary were nevertheless required to follow the practice suggested by the House Report in connection with EAJA awards, the entry of a "final judgment" for EAJA purposes would be contingent upon some subsequent judicial action even though no such action is required by the Act. The possibility of an EAJA fee award cannot be permitted to alter the substantive requirements of the Social Security Act in this manner, and nothing in the text or purposes of EAJA -- or in common sense -- requires that anomalous result. The approach adopted by the court below avoids this problem (as well as the burden and delay resulting from increased filings and review by the district court), while at the same time furnishing a clear and workable standard for determining when the 30-day period begins to run in this setting.

6. Finally, contrary to petitioner's contention (Pet. 13-

15), the decision below does not have an unfair impact on petitioner, such that it should not be applied retroactively to prevent him from recovering fees. Petitioner had no reasonable basis for believing that a fee request filed more than a year after the Appeals Council's uncontested finding of disability would be deemed timely. Moreover, the appellate decisions cited by petitioner (Pet. 14) as having suggested a contrary rule -- the Fourth Circuit's decision in Guthrie and the Third Circuit's decision in Brown -- were not binding on the District Court for the Central District of California in this case. And those decisions were handed down before the 1985 amendments to the statutory scheme that made clear that the term "final judgment" for purposes of EAJA departs substantially from its meaning in the specific context of judicial proceedings. The Ninth Circuit's reasoning in this case was based on the text of EAJA and Section 405(g), which furnished adequate notice to petitioner that the Secretary was not required to file his decision on remand with the district court. The Ninth Circuit's decision also adhered to Hudson and anticipated the rationale of Finkelstein, in which this Court found the text of Section 405(g) controlling. In these circumstances, petitioner cannot claim unfair surprise.

In addition, even if petitioner's fee request were deemed timely, it is quite unlikely that he would be found entitled to fees. The district court addressed the merits of petitioner's fee application and held that no fees should be awarded because

the government's position was substantially justified. Pet. App. 1-5. If the court of appeals had reached the merits, it would have been obligated to affirm the district court's ruling on this point unless it found that the district court had abused its discretion. Pierce v. Underwood, 487 U.S. 552 (1988). The district court specifically found, however, that the Secretary's initial denial of disability benefits was supported by the medical evidence then in the record, and the government promptly changed its position when petitioner presented new evidence of disability in connection with his second application. Pet. App. 3. This course of proceedings does not suggest that the overall position of the government lacked substantial justification. A fortiori, the district court did not abuse its discretion in so holding. Thus, there is no reason to believe that the court of appeals' construction of EAJA's time limits had any effect on petitioner's ultimate entitlement to attorney fees.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1990

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN,)	NO. CV 84-4317-MRP(K)
)	
Plaintiff,)	<u>DEFENDANT'S SUPPLEMENTAL</u>
)	
v.)	<u>MEMORANDUM</u>
)	
MARGARET M. HECKLER, Secretary)	
of Health and Human Services,)	
)	
Defendant.)	

The Appeals Council has agreed, upon review, to a voluntary remand for further administrative proceedings in this case. A Stipulation for Voluntary Remand was requested of plaintiff's attorney but he would not agree to so stipulate. Defendant hereby requests that the Court, in its discretion and pursuant to plaintiff's prayer for relief in his complaint, order this case be

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remanded pursuant to the Appeals Council decision to review for further administrative proceedings.

DATED: This 18th day of December, 1984.

Respectfully submitted,

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

Evelyn M. Matteucci
EVELYN M. MATTEUCCI
Assistant United States Attorney
Attorneys for Defendant

APPENDIX B

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DEC 2 1984

U. S. ATTORNEY
CIVIL DOCKETS

John Ohanian Inc.
548 S. Spring St., Ste. 1034
Los Angeles, CA. 90013
(213) 629-4600
Attorney for Plaintiff

FILED

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN,

Plaintiff,

vs.

MARGARET M. HECKLER,
Secretary of Health
and Human Services,

Defendant.

NO. CV 84 4317 MRP-K

PLAINTIFF'S OBJECTION TO
DEFENDANT'S MOTION FOR
VOLUNTARY REMAND

When the plaintiff appealed to the Secretary's Appeals Council for review of Administrative Law Judge Harry C. Kessel's decision denying the plaintiff's disability, the Appeals Council advised that there was no basis under the regulations to grant review, (Tr. 2), and that if he wished to appeal, he should bring action in U.S. District Court.

Now that the plaintiff has followed the Secretary's advice and appealed to the District Court, the Secretary appears to have changed her position, in that she requests "voluntary remand for further administrative proceedings." The Secretary however does not admit error or indicate what will happen in the course of administrative

1 proceedings. The Secretary's vague reference presents the real pos-
2 sibility of returning to Judge Kessel for another installment of er-
3 ror ridden and grossly defective proceedings. Plaintiff does not
4 particularly welcome such a prospect.

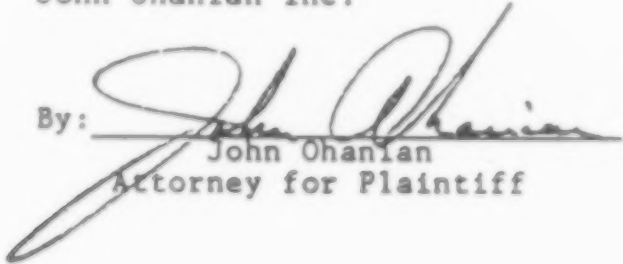
5 Counsel for plaintiff believes that the record is complete,
6 and that plaintiff has proved his disability based on his applica-
7 tion of May 28, 1982. Counsel knows of nothing that remains to be
8 done, except for the Secretary to order payment of benefits. Counsel
9 sees no advantage in regressing to a lower level of review; our ju-
10 dicial system is structured for appeal to a higher level of review
11 for a dissatisfied claimant such as the plaintiff. Since the Secre-
12 tary is not yet inclined to order payment of benefits to the plain-
13 tiff, he has no choice but to appeal to the Court to order payment
14 of benefits.

15 The plaintiff therefore prays that the Court will reject the
16 Secretary's request and grant the plaintiff's motion for summary
17 judgement.

18 Dated: December 27, 1984

19 Respectfully submitted,

20 John Ohanian Inc.

21 By: 
22 John Ohanian
23 Attorney for Plaintiff
24
25
26
27
28

1 John Ohanian Inc.
2 548 S. Spring St., Ste. 1034
3 Los Angeles, CA. 90013
4 (213) 629-4600
5 Attorney for Plaintiff

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U. S. ATTORNEY
CIVIL DOCKETS

U. S. Attorney	init.
Chief Assistant	
Chief-Civil Div.	2
Chief-Crim. Div.	
Chief-Tax Div.	
Admin. Officer	
Cims-Jdgmts Sec.	
Docket-Civil	1 qk
Docket-Criminal	
Matence	3
File	

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 ZAKHAR MELKONIAN,)
11 Plaintiff,) NO. CV 84 4317 MRP(K)
12 vs.) EX PARTE APPLICATION
13 MARGARET M. HECKLER,) TO REMAND: AND ORDER
14 Secretary of Health)
15 and Human Services,)
16 Defendant.)

18 On December 18, 1984, defendant filed a supplemental memoran-
19 dum advising that the Appeals Council had agreed to a voluntary re-
20 mand for further administrative proceedings in this case.

21 On December 27, 1984, plaintiff filed an objection to the
22 defendant's motion for voluntary remand, with the expectation that
23 the Magistrate would promptly issue his report and recommendation.

24 Plaintiff advises that his breathing problem has worsened and
25 that his wife is seriously ill, so that he is confronted with con-
26 siderable medical expenses and is anxious to have this matter con-
27 cluded. In the event a favorable decision issued in this case, plain-
28 tiff would receive funds that could be used for medical expenses.

In view of the mentioned circumstances, counsel for plaintiff files this ex parte application for an order remanding this case to the defendant, with the belief that this will expedite resolution of the plaintiff's claim. Since plaintiff does not know when the Magistrate may issue his report and recommendation in this case, plaintiff asks the Magistrate to use his discretion and either issue his report and recommendation, or remand the cause to the Secretary.

Dated: March 28, 1985

Respectfully submitted,

John Ohanian Inc.

By: John Ohanian
Attorney for Plaintiff

ENTERED

APR 05 1985

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN,

NO. CV 84-4317-MRP(K)

Plaintiff,

JUDGMENT

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH
and HUMAN SERVICES,

Defendant.

Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

DATED: This 3 day of April, 1985.

Mariana R. Pfelzer
MARIANA R. PFELZER
United States District Judge

OCTOBER TERM, 1990

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES

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